IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA	)	
	)	Criminal No. 1:07CR209
v.	)	
	)	Hon. T.S. Ellis, III
WILLIAM J. JEFFERSON,	)	
	)	
Defendant.	)	

GOVERNMENT'S SECOND SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO TAKE FOREIGN DEPOSITIONS

The United States, by and through the undersigned counsel, files this second supplemental memorandum in opposition to the defendant's motion to take foreign depositions. Nearly six months after Defendant Jefferson originally filed his motion seeking to compel foreign depositions, he has been forced to admit that he: (1) cannot provide this Court with any specificity about the forecasted testimony of former Vice President Atiku Abubakar and Suleiman Yahyah that he claims is exculpatory; and (2) cannot even assure this Court that either witness would be willing to provide any testimony whatsoever even if compelled to attend the depositions he seeks. In short, Defendant Jefferson simply cannot satisfy the heavy burden he faces in seeking foreign depositions. In light of these belated admissions, the exacting standard set forth in Rule 15, and the applicable law, the Court should deny this motion.

The taking of depositions in criminal cases – unlike civil cases – is generally disfavored. *United States v. Rosen*, 240 F.R.D. 204, 208 (E.D. Va. 2007) (*Rosen VI*); *see also United States v. Drogoul*, 1 F.3d 1546, 1551 (11th Cir. 1993). As such, Rule 15(a) of the Federal Rules of Criminal Procedure only permits depositions in a criminal matter "because of exceptional circumstances and

in the interest of justice" for the purpose of "preserv[ing] testimony for trial." The moving party, in this case Defendant Jefferson, bears the burden of showing the existence of exceptional circumstances that would justify the issuance of an order for a Rule 15 deposition. *Drogoul*, 1 F.3d at 1552. In deciding whether to exercise its discretion in favor of ordering foreign depositions, a court must consider a number of critical factors: (a) unavailability, (b) materiality, and (c) the interests of justice. *Rosen VI*, 240 F.R.D. at 208 (E.D. Va. 2007); *see also United States v. Thomas*, 62 F.3d 1332, 1340-41 (11th Cir. 1995).

Although it is true that this Court could, in its discretion, accept oral representations by counsel addressing these different factors, it is clear that "affidavits are preferred" and routinely used in seeking a court order under Rule 15. *United States v. Sindona*, 636 F.2d 792, 804 (2d Cir. 1980); *see United States v. Figueroa*, No. CR 95-0823, 1996 WL 68529 at *1 (E.D.N.Y. Feb. 1, 1996) ("There is no affidavit from the witness in question as to precisely what his testimony would be or the reasons for his alleged unavailability to appear here. The present papers submitted by defendant are insufficient to justify the court in exercising its discretion to permit the oral depositions."); *see also United States v. Guild*, No. 1:07cr404 (JCC), 2008 WL 134562, at *3 (E.D. Va. Jan. 9, 2008); *United States v. Chulsid*, 2000 WL 1449873 at *1-2 (S.D.N.Y. Sept. 27, 2000); *United States v. Daniels*, 194 F.RD. 700, 702 (D. Kan. 2000) (denying request for foreign depositions where no affidavits were submitted because government had "not demonstrated to the court that there is a substantial likelihood that [the witness] will be unable to testify at trial"). Thus the issue here is not whether affidavits are required so much as it is whether, in a given case, representations by counsel are sufficient to carry the movant's burden in the absence of an affidavit.

In the instant case, counsel's representations alone are simply not sufficient to carry the defendant's burden. This is because the few conclusory representations by counsel of the entire forecasted testimony of Vice President Abubakar and Mr. Yahyah do not describe *any facts* to which these witnesses would testify. *See* Gov.'s Supp. Memo in Opp. to Mot. to Take Foreign Deps., Dkt, Entry No. 202, at 9-12. To meet his burden under Rule 15, the defendant should have provided this Court with a factual, not theoretical, basis to find that the forecasted testimony of these witnesses will, in fact, be exculpatory. *See Rosen VI*, 240 F.R.D. at 209 ("materiality analysis requires examination of the forecasted testimony"); *United States v. Blevins*, 960 F.2d 1252, 1259 (4th Cir. 1992) (establishing materiality requires something more than speculation). The defendant's recent admission that he cannot do so merely underscores his inability to meet his burden. This is particularly troubling when both prospective witnesses have retained attorneys in Washington, D.C., and thus the task of obtaining affidavits, as ordered by the Court, was not a herculean one.

Furthermore, without the requested affidavits, the Court has no assurance that either Vice President Abubakar or Suleiman Yahyah would actually testify rather than merely invoke their respective rights to remain silent.[1] This is a critical piece of the analysis, as a witness who would likely invoke his right to remain silent would have no effect on a trial, that is, his testimony could

[1] Both proposed witnesses may have a right to remain silent under either the United States Constitution or the Nigerian Constitution, or both. U.S. Const. amend V (No person "shall be compelled in any criminal case to be a witness against himself."); *Hoffman v. United States*, 341 U.S. 479, 486 (1951); Const. of the Fed. Rep. of Nigeria of 1999, ch. IV (Fundamental Rights), sec. 35(2) ("Any person who is arrested or detained shall have the right to remain silent or avoid answering any question until after consultation with a legal practitioner or any other person of his own choice."); *Adekunle v. State*, [2006] 6 N.I.L.R. 301 (Nigeria) (An accused person "is not bound to say anything" as it is "his Constitutional right to remain silent" and thus he is "not a compellable witness.") (citing *Singh v. State*, [1998] 1 N.S.C.C. 852). At the very least, this is an issue that could lead to significant litigation about their ability to invoke such protections.

not be deemed material. *United States v. Iribe-Perez*, 129 F.3d 1167, 1173-74 (10th Cir. 1997). Accordingly, if both of these witnesses intend to invoke a right to remain silent, their non-testimony cannot possibly be material to the defendant's defense at trial. Having not submitted affidavits addressing this issue, as ordered by the Court, the defendant thus cannot meet his burden of proving materiality.

Moreover, the unwillingness of both witnesses to provide an affidavit of any kind to Defendant Jefferson reinforces that neither witness is willing to testify voluntarily. This is yet another important factor that courts have long considered in deciding whether to exercise discretion in favor of ordering a foreign deposition. *See, e.g.*, *United States v. Olafson*, 213 F.3d 435, 442 (9th Cir. 2000) ("In deciding whether to grant a Rule 15(a) motion, the district court must consider, among other factors, whether the deponent would be available at the proposed location for deposition and would be willing to testify."); *United States v. Omene*, 143 F.3d 1167, 1169 (9th Cir. 1998) (upholding denial of foreign deposition when, *inter alia*, there was no reason to believe witness would be available in Lagos, Nigeria); *United States v. Zuno-Arce*, 44 F.3d 1420, 1425 (9th Cir. 1995) (district court focused appropriately, *inter alia*, on "whether deponents would be available for deposition and willing to testify"); *United States v. Hernandez-Escarsega*, 886 F.2d 1560, 1569 (9th Cir. 1989) (one factor, among others, was witness's "unwillingness to testify for fear of personal prosecution"); *United States v. Nichols*, 534 F.2d 202, 204 (9th Cir. 1976) (no adequate showing, among other things, that "the witnesses would be available for depositions, or that they would be willing to testify"); *United States v. Trenary*, 473 F.2d 680, 682 (9th Cir. 1973) (same); *United States v. Whiting*, 308 F.2d 537, 541 (2d Cir. 1962) (movant must demonstrate availability of proposed witnesses and their willingness to appear for deposition). The unwillingness of these men to even

provide simple affidavits for submission to this Court, much less to attend any depositions voluntarily, is a significant relevant factor weighing against this Court exercising its discretion to order depositions pursuant to Rule 15.

In sum, as the case law makes clear, a court has broad discretion in deciding whether foreign depositions should be permitted under Rule 15. In analyzing whether to permit such depositions, the Court must weigh a variety of factors. In this case, based on the paucity of evidence produced by the defendant and the recalcitrance of the prospective witnesses, numerous factors counsel against permitting such foreign depositions:

- Lack of Any Specificity of Forecasted Testimony
- Proposed Witnesses' Likelihood of Invoking Potential Right to Remain Silent
- Proposed Witnesses' Unwillingness to be Deposed
- Proposed Witnesses' Status as Unindicted Co-Conspirators
- Conclusory Assertion of Unavailability of Vice President Abubakar Contradicted by Press Statement
- Untimeliness of Motion
- Possible Year-Long Delay or More of Trial to Pursue Letters Rogatory Process
- Danger to United States Officials

See Gov.'s Supp. Memo in Opp. to Mot. to Take Foreign Deps., Dkt, Entry No. 202, at 4-12. For all of the reasons raised in this second supplemental memorandum and in the government's initial opposition and first supplemental memorandum in support thereof, the Court should deny the defendant's motion.

CONCLUSION

WHEREFORE, the government respectfully requests that the Court deny the motion to take foreign depositions through the issuance of letters rogatory.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of October, 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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